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The Supreme Court of the United States

October Term, 1936

No. [redacted] 7

SILAS MASON COMPANY, INC., WALSH CONSTRUCTION COMPANY, GUY F. ATKINSON, GEORGE H. ATKINSON, WILLIAM E. KIER and ELMER L. KIER, copartners as Atkinson-Kier Company, and Mason-Walsh-Atkinson-Kier Company,

Appellants,

vs.

TAX COMMISSION OF THE STATE OF WASHINGTON; HAROLD H. HENNEFORD, THOMAS S. HEDGES and T. M. JENNER, constituting the Tax Commission of the State of Washington,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLANTS

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No. 773

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I.

THE OPINION OF THE COURTS BELOW

The opinion of the Supreme Court of the State of Washington is reported in Volume 88 Washington Decisions, p. 60, 61 Pac. (2d) 1269. The companion case of Ryan v. The State of Washington is reported in Volume 88 Washington Decisions, p. 75, 61 Pac. (2d) 1276. Copies of the opinion will be found at page 56 of the Record.

II.

JURISDICTION

1. The decree of the Supreme Court of the State of Washington was rendered October 28, 1936. (R. 56.)

2. Appellants by their amended complaint specially set up and claimed that the Occupation Tax Act of the State of Washington was invalid because repugnant to the Constitution of the United States of America, and consequently unconstitutional and void as applied to the transaction stated in the amended complaint. (R. 15, 16.) The Superior Court of the State of Washington for Thurston County ruled the Washington Occupation Tax to be a valid exercise of the taxing power of the State, and the tax levied pursuant thereto to be valid and entered its decree dismissing the action and denying the injunctive relief prayed. (R. 47, 55.) On appeal the Supreme Court of the State of Washington made the same ruling against

the same claim and affirmed the decree of the lower court. (R. 56.)

3. The jurisdiction of this Court is invoked under Judicial Code, Section 237 (a), as amended by the Act of February 13, 1925, U. S. C. A. Title 28, Section 344 (a).

4. It is believed that the following cases sustain the jurisdiction of this Court in the circumstances:

Panhandle Oil Co. v. Knox, 277 U. S., 218;
Northwestern Ins. Co. v. Wisconsin, 275 U. S. 136;
Gillespie v. Oklahoma, 257 U. S. 501;
McCulloch v Maryland, 4 Wheat. 316;
Ft. Leavenworth R. R. Co. v. Lowe, 114 U. S. 525;
Surplus Trading Co. v. Cook, 281 U. S. 647.

III.

STATEMENT OF THE CASE

Appellants brought this action to enjoin the collection of the Washington Occupation Tax upon the ground that as applied to them the Act was unconstitutional. The facts have not been in dispute. The only question presented is the proper application of constitutional principles. The trial court sustained the validity of the tax and accordingly entered judgment dismissing the action. (R. 47 and 55.) On appeal the Supreme Court affirmed the decree of the trial court.

None of the appellants are residents of the State of Washington. All are in the state solely to build the Grand Coulee Dam for the United States government.

They engage in no other business within the state. Since the case turns on the nature of this undertaking and the purposes of it, something of detail is necessary.

We quote the premises and part of Article I of the contract under which appellants are working for the United States government:

> "THIS CONTRACT, entered into this 16th day of July, 1934, by THE UNITED STATES OF AMERICA * * * and Silas Mason Company, Inc., * * * ; Walsh Construction Company, * * *; and Atkinson-Kier Company, * * *:
>
> "ARTICLE I. *Statement of Work.* The contractor shall furnish labor and materials, and perform all work required for construction of Grand Coulee Dam and Power Plant, * * * for the consideration of twenty nine million three hundred thirty nine thousand three hundred one & 50/100 dollars ($29,339,301.50) in strict accordance with the specifications, schedules, and drawings, * * *."

The detailed requirements of the contract are set forth in Exhibits "A" and "B," consisting of copies of the contract and specifications. For the purpose of this case it is sufficient to say that appellants agree to build the dam and power plant for a lump sum specified in the contract. The United States furnishes the site, prescribes plans and specifications in detail, requires all work to be done under its direction and control and to its satisfaction, and undertakes to furnish the greater part of the material. The contractor agrees to furnish equipment and to employ labor, and generally to supply the work necessary to erect the

dam and power house but subject in all ways and at all times to the direction, supervision and control of the government. The original contract has been amended by the government (pursuant to power reserved) to provide for the construction only of the foundation for the much larger high dam. This change, while increasing the amount involved by more than $7,000,000, does not change the character of the work or the conditions under which it is carried on.

The Grand Coulee Dam is located approximately in the center of the State of Washington, at the head of what is known as the "Grand Coulee." It is the key structure in all of the plans for the regulation and control of the Columbia River and its tributaries. When completed it will create a quiet water pool extending from the middle of the State of Washington to the Canadian boundary, a distance of over 150 miles. It is being built pursuant to the recommendation of the Chief of Engineers, United States Army.

Under date of March 29, 1932, the Secretary of War transmitted to Congress a report by the Chief of Engineers, United States Army, made pursuant to the Rivers and Harbors Act of January 21, 1927. This report (House Document 103 of the 73d Congress, First Session) recommended the construction of ten dams across the Columbia River at places within the State of Washington or on the boundary line between Washington and Oregon. One of these dams, the Grand Coulee Dam is now in course of construction pursuant to the authorization of Congress contained

in the Rivers and Harbors Act of the 74th Congress, which we quote in part:

> "For the purpose of controlling floods, *improving navigation,* regulating the flow of streams of the United States, * * * and for the generation of electric energy as a means of financially aiding and assisting such undertakings, the projects known as * * * 'Grand Coulee Dam' on the Columbia River, are hereby authorized and adopted, * * *."

The Columbia River is one of the great rivers of the world. In North America it is second only to the Mississippi in size. It rises in Canada and enters the United States on the northern boundary of the State of Washington. Flowing southerly through the middle of that state it turns west and flows to the Pacific Ocean, forming the southern boundary of the State of Washington and the northern boundary of the State of Oregon.

The Columbia River throughout its course is navigable, both in fact and in law. Historically, it has formed one of the highways of commerce. Its lower reaches are navigated by ocean-going vessels of the largest size, carrying an important part of the trade of the United States with Pacific Ocean ports, including Alaska, South America, the Hawaiian Islands and the Orient.

The site of the Grand Coulee Dam is a reservation of the United States government. Exhibit "C" is a map and letter of explanation showing the land acquired by the United States and the use to which it is put. Briefly stated, the dam itself, all structures in

connection with it as a completed entity, the contractor's camp and all structures therein, and all operations of either the government or the contractor in connection with building the dam are located upon this reservation. The State of Washington has consented to this purchase and has ceded jurisdiction over the land by statute. Remington's Revised Statutes, § 8108.

THE WASHINGTON OCCUPATION TAX

The Tax Commission of the State of Washington have levied a tax of ½ of 1% of the gross sum agreed to be paid to appellants by the United States for the building of the dam. The levy is pursuant to the Occupation Tax Act, originally enacted by Chapter 191, p. 869, Session Laws of 1933, amended by Chapter 57, p. 157, Laws Special Session 1933. The nature of the tax appears from its title, which we quote:

> "An Act relating to taxation; imposing taxes upon the privilege of engaging in business activities * * *."

Section 2-a (1) of the Act as amended in part provides:

> "* * * there is hereby levied and there shall be collected from every person engaging or continuing within this state in the business of rendering or performing services * * * an annual tax or excise for the privilege of engaging in such business * * * equal to the gross income of the business multiplied by five-tenths of one per cent; * * *."

By section seventeen of the Act the tax commission is empowered to bring an action to enjoin any tax-

payer from continuing to engage in business because of non-payment of the tax.

The Supreme Court of the State of Washington holds that this occupation tax is not a property tax nor an income tax nor a tax upon business but is an excise levied upon the privilege of engaging in business within the state. State v. Yelle, 174 Wash. 402, Rainier Nat. Park v. Henneford, 182 Wash. 159, 45 Pac. (2d) 617, Silas Mason, Inc. v. State Tax Com., 88 Wash. Adv. Op. 60.

SUMMARY OF THE FACTS

The United States in the exercise of its constitutional power to regulate commerce is engaged in constructing a dam across a navigable river upon land which it has acquired within the State of Washington. The site, the materials, the plan and detailed specifications, and the control and supervision of the work are all directly supplied by the United States. The largest proportion of the total cost is paid directly by the United States. The appellants, under the direction and supervision of the United States, are building the foundation of the dam. Since appellants are nonresidents who have come into the state solely for the purpose of performing this work and are in fact engaging in no other occupation therein, the tax is levied solely on the privilege of building the foundation for the United States.

IV.

ASSIGNMENT OF ERRORS

Appellants assign the following errors in the record and proceedings in the said case. That the statute of the State of Washington imposing an occupation tax is unconstitutional and void as applied to the particular transactions stated in the complaint of appellants in this:

1. That the challenged tax is levied directly upon the consideration paid by the United States to the appellants for the performance of a contract by means of which the United States Government is carrying on a governmental enterprise. The Supreme Court of the State of Washington erred in holding such a tax to be a valid exercise of the taxing power of the State, and erred in affirming the judgment of the Superior Court of the State of Washington, for Thurston County, which upheld the validity of the tax and therefore denied injunctive relief to appellants.

2. That the contract between the United States Government and appellants upon which the challenged tax is levied is being performed upon land acquired by the United States for the purpose. Exclusive jurisdiction over this land has been ceded by the State of Washington to the United States. The Supreme Court of the State of Washington erred in holding that the State of Washington has power to tax the occupation carried on by appellants in that territory, and erred in affirming the judgment of the Superior Court of the State of Washington, for

Thurston County, which upheld the validity of the tax and therefore denied injunctive relief to appellants.

V.

ARGUMENT

A. NATURE OF TAX.

The Washington Occupation Tax is not a tax upon appellants' property, either in form or substance; nor is it levied in lieu of a tax upon property. It is in addition to the ordinary property taxes. It is not a license tax upon foreign corporations, nor in lieu of such a tax. It is in addition to the ordinary license fee paid by foreign corporations. Nor is it an income tax levied upon net income. It is in substance what it is in name, that is: an excise measured by gross income.

The tax, laid in form upon appellants in this case, is clearly a tax laid in substance upon a purchase by the United States because of two circumstances. First: the only income of appellants is the sum paid them by the United States pursuant to their contract, because the only occupation of appellants within the State of Washington is furnishing to the United States the things called for by their contract. Even in form, the tax is levied directly on the price of a purchase by the United States. Second: the tax is measured by the gross income of appellants (that is to say, by the gross purchase price paid to them by the United States).

B. TAX MEASURED BY GROSS INCOME A DIRECT BURDEN.

It is established by the cases, indeed it has never been questioned, that a tax upon or measured by a gross (as contradistinguished from net) income is a direct and immediate (as contradistinguished from indirect and remote) burden upon the transaction or occupation producing the income. In United States Glue Co. v. Oak Creek, 247 U. S. 321, the court says (p. 328):

> "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental."

In Fox Film Corporation v. Doyal, 286 U. S. 123, the court says (p. 126):

> "The Gross Receipts Tax Act (Georgia Laws, 1929, p. 103), describes the tax as laid upon the privilege of engaging in certain occupations 'and upon certain business and commercial transactions and enterprises.' As the tax is measured by gross receipts, the case is not ruled by Educational Films Corp. v. Ward, 282 U. S. 379, where the tax was based upon the net income of the corporation. Appellant insists, and we think rightly, that the operation of the statute here in question, in its application to gross receipts, is to impose a direct charge upon the royalties."

Without further quotation we call the Court's attention to the cases of Crew Levick Co. v. Pennsylvania, 245 U. S. 292, Northwestern Insurance Co. v.

Wisconsin, 275 U. S. 136, and Stewart Dry Goods Co. v. Lewis, 294 U. S. 550, in which the distinction is pointed out and made the basis of decision.

C. SUBSTANCE NOT FORM DETERMINES VALIDITY OF TAX.

It needs but to be stated that the power of the United States government to regulate commerce is conferred by the Constitution of the United States. No excise tax on the exercise of this power can be valid. Likewise the power extends to the choice of the means to be employed. The United States may choose, as at the Grand Coulee Dam, itself to purchase cement and steel and employ engineers. The cases are uniform in holding that a tax upon such purchases is void. It may choose, as at the Grand Coulee Dam, instead of purchasing cement, steel and services separately, to purchase a structure completed in whole or in part, which combines the cement, steel and services purchased by it with other material and services supplied by a contractor. In reason and substance, the purchase of material and services jointly instead of separately is not different. The final result to the United States is the same, namely: a completed dam for the regulation of commerce. In either case the effect of a tax upon the purchase is the same, namely: a higher purchase price which the United States must pay.

To say that the purchase by the United States of materials or services is not taxable because the added

cost is an interference with its constitutional functions, but that a contract for the supply of the same materials and services is taxable, is to disregard the substance and nature of things and to look merely at forms and names. Equally, to say that a sale to the United States is not taxable nor is a contract amounting to a sale taxable, but that the income derived from the sale or contract may be taxed or be used as the measure of computation for a tax, is likewise to disregard substance and to look only at form. This Court has never indulged form at the expense of substance by such reasoning.

In tax questions, as in others, the Court has always looked to the substance and disregarded the form. The effect of a tax act and not its name determines its validity. "The substance and not the shadow determines the validity of the exercise of the taxing power."

A tax laid in terms on the occupation of an importer is in effect a tax on imports. Brown v. Maryland, 12 Wheat. 419, 444. Answering the contention that a state may tax an occupation, and that this tax was nothing more, Chief Justice Marshall said:

> "It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself. * * * So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer,

> or by the importer himself, in like manner as a direct duty on the article itself would be made. This the state has not a right to do, because it is prohibited by the constitution."

In brief the cases have held: a tax on the occupation of an importer is, in effect, a tax on imports, Brown v. Maryland, supra; a tax on the income of an office is a tax on the office itself, Dobbins v. The Commissioners, 16 Pet. 435; a tax upon the business of an auctioneer, measured by the amount of sales, is a tax upon the sales and invalid, so far as sales of imported goods were concerned, because in substance a tax on imports, Cook v. Pennsylvania, 97 U. S. 566; a tax on bills of lading is a tax on the articles covered, Fairbanks v. United States, 181 U. S. 283; a tax on charter parties is a tax on the articles covered, United States v. Hvoslef, 237 U. S. 1; a tax on policies of marine insurance is a tax on the goods insured, Thames Insurance Company v. United States, 237 U. S. 19; a tax on the business of selling goods in foreign commerce is a tax on exports, Crew Levick v. Pennsylvania, 245 U. S. 292. See also Indian Oil Co. v. Oklahoma, 240 U. S. 522, Gillespie v. Oklahoma, 257 U. S. 501, Burnet v. Coronado Oil & Gas Co., 285 U. S. 393.

APPLICATION OF THE CASES

In logic and by precedent there is no distinction between a purchase of a single item by the United States for use in the Grand Coulee Dam and the simultaneous purchase of many items combined with services (as by the contract with appellants) for use in the Grand

Coulee Dam. Both, irrespective of form, in fact are purchases by the United States. Likewise, the fact that the tax in form is payable by appellants and measured by their gross income, does not disguise the fact that it is levied on a purchase by the United States.

D. PURCHASES BY THE UNITED STATES NOT TAXABLE.

Not only is the tax upon appellants, actually a tax upon a purchase by the United States, but it is a direct and immediate charge because it is measured by the gross purchase price, solely. The tax, which appellants must pay, rises or falls directly with the amount paid to them by the United States—no other factor enters into the computation. Directly upon each dollar which the United States pays the state levies tribute. That such a tax is beyond the power of a state, has uniformly been ruled.

Panhandle Oil Co. v. Knox, 277 U. S. 218, is precisely in point. There, the State of Mississippi levied "for the privilege of engaging in such business an excise tax of 1c (one cent) per gallon upon the sale of gasoline. * * *" Here the State of Washington levies "an annual tax or excise for the privilege of engaging in such business * * * equal to the gross income of such business multiplied by five-tenths of one per cent * * *." In short, there, as here, we have an excise tax levied on the privilege of engaging in business. The tax is measured as to amount by

gross sales or gross income which are one and the same. In that case, a gasoline dealer sold gasoline to the United States for the use of its Coast Guard fleet and in its Veterans' Hospital. In this case, appellants sell material and services to the United States for use in building a dam across a navigable river. It will not escape notice consequently that there, as here, the contract involved was a direct one between the United States and the dealer, and that the tax was in form an excise on the privilege of doing business within the state but measured as to its amount by the gross amount of sales to the United States. We quote (p. 221):

> "* * * The petitioner's right to make sales to the United States was not given by the State * * *; it results from the authority of the national government under the Constitution to choose its own means and sources of supply. * *"

And again (p. 222):

> "* * * Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests. The amount of money claimed by the State rises and falls precisely as does the quantity of gasoline so secured by the Government. It depends immediately upon the number of gallons. * * * To use the number of gallons sold the United States as a measure of the privilege tax is in substance and legal effect to tax the sale. * * *"

The perfect parallel shown by the facts of the Panhandle case and the present is emphasized by the court's analysis in the opinion. "Sale and purchase constitute a transaction by which the tax is measured * * *." (p. 222)—so here. The amount of

money claimed by the state rises and falls precisely as does the quantity of materials and labor secured by the United States. We submit, therefore, that here, too, "It is immaterial that the seller and not the purchaser is required to report and make payment to the state." (p. 222.) And that "While Mississippi (Washington) may impose charges upon petitioner (appellants) for the privilege of carrying on trade that is subject to the power of the state, it may not lay any tax upon transactions by which the United States secures the things desired for its governmental purposes." (p. 221.)

Panhandle Oil Co. v. Knox is followed by Indian Motocycle Co. v. United States, 283 U. S. 570, in which the question was of the power of the United States to tax a sale to a municipal corporation of the State of Massachusetts. The United States levied an excise tax on the manufacturer of motorcycles "equivalent to the following percentage of the price for which so sold * * *." (p. 573.) The court first finds that the excise though in form, levied on the manufacturer is, in fact, a tax on the sale. The court then comments on the facts in Panhandle Oil Co. v. Knox, and quotes the language of that decision, deciding finally that the same principle applies. The court says (p. 579):

> "Here the tax is laid directly on the sale to a governmental state agency of an article purchased for governmental purposes. The sale and purchase constitute a single transaction, in which the purchaser is an essential participant. Without that participation the sale could not be effected. Thus, the transaction falls within the class which

the United States cannot tax consistently with the constitutional principle."

Of this case, also, it will be noted that the tax is an excise, levied in form on a private individual, measured as to amount by the gross sale price. Again the form is disregarded and the tax held to be on the sale. Again, it is held to be a direct and immediate burden. Again, we submit that the parallel facts in the Panhandle Oil Co. v. Knox case, in the Indian Motocycle Co. v. United States case, and the present case, require a like reasoning and a like conclusion. In all three cases, the tax is an excise laid directly (since in each it is measured by the gross sales price) on the sale to the government of an article purchased for government purposes. In the case now before the Court, as well as in the Indian Motocycle case, "The sale and purchase constitute a single transaction, in which the purchaser is an essential participant. Without that participation the sale could not be effected." (p. 579.) The conclusion drawn there must be drawn in the present case or "consistency of constitutional principle" vanishes.

The principle has again been applied and the reasoning and language of the Panhandle Oil Co. v. Knox case again been employed in Graves v. Texas Co., 298 U. S. 393. The statutes of Alabama enacted: "Every distributor, refiner, retail dealer or storer of gasoline * * * shall pay an excise tax of six cents per gallon upon the selling, distributing, storing or withdrawing from storage in this state for any use * * *." The Texas Company made written contracts with the Uni-

ted States to supply gasoline in large quantities over a period of time. The gasoline was produced and refined in Texas, transported to Alabama, stored there and delivered to the United States from time to time for use by the army, the department of the interior and the Tennessee Valley Authority. Now, once again, we have the parallel facts. An excise tax, levied in form on storage, but measured as to amount by gross deliveries. Again, the court looks through the form of levy to the substance and effect, saying (p. 401):

> "A tax upon anything so essential to the sale of gasoline to the United States is as objectionable as would be a tax upon the sale itself. The validity of the tax is to be determined by the practical effect of enforcement."

The court then quotes from Panhandle Oil Co. v. Knox and applies the principle there announced as controlling.

We submit that the excise tax the State of Washington is attempting to levy is much more directly, much less remotely, an interference with an essential undertaking of the United States. Here, the government has purchased a foundation for a dam which will be used for the improvement of navigation and the regulation of commerce. Upon this purchase the State of Washington is attempting to levy an excise under the disguise of a tax on the occupation of building dam foundations. But this is to tax an undertaking of the United States directly. In Graves v. Texas Co. the tax is on the storage of gasoline, which is ultimately supplied to the United States for use by the Tennessee Valley Authority, which, in turn, is im-

proving navigation and regulating commerce by means of dams in the Tennessee River. The storage, and the tax thereon, is separated in time and in logical connection from the regulation of commerce. Here the tax on the purchase price of the dam is direct and immediate, separated neither in point of time nor in logical connection.

Of course, it is clear that, if a tax of one half of one per cent may be levied on a project of internal improvement carried on by the United States, the rate may be increased to 1%, 5%, 10%, etc. Likewise, if one state may tax such an operation of the United States, so may other states tax those within their bounds. In short, the principle of such taxes involves so heavy a cost to the United States as to amount to a very real burden on any work of internal improvement undertaken by the United States.

E. TAX ON MEANS EMPLOYED A DIRECT BURDEN ON GOVERNMENTAL FUNCTION.

The point at issue, however, is not entirely, nor even principally, one of financial loss to the United States. The United States and the State of Washington, for present purposes, are independent sovereignties. It is contrary to the principles of our Constitution, it is derogatory to the dignity of the United States, that a state should be permitted to control the operations of the United States by dictating to it how the work shall be carried on. The prime question then is not so much whether the United States, by reason of a state tax,

shall be required to pay few or many dollars for a public improvement; but whether the states may decide that a particular method of accomplishing the desired end shall or shall not be employed. The choice of the means to be employed for the regulation of navigation and control of commerce is of necessity in that power to which the regulation is committed—the United States. If a state may levy a tax on one means or method of performing the work, it may, by increasing the tax to prohibitive amounts, altogether prevent the United States from using that means or method.

Having the right to regulate commerce and hence to improve the navigation of the Columbia River, the United States necessarily has the right to decide how the improvement of navigation may be effected. The Chief of Engineers of the United States Army advised Congress that the improvement of the Columbia River could best and most economically be effected by means of a series of dams of which the Grand Coulee dam is the key structure. The design and method of construction of these dams must of necessity be solely within the choice of the United States. Equally the choice whether, in whole or in part, the Grand Coulee Dam shall be built by contracts (such as that with appellants) or by other means or methods, must of necessity be that of the United States.

This choice of means the State of Washington may not burden or control consistently with constitutional theory and the accepted rule of this court. Yet it does burden and control this choice of means by the tax in

question. As noted above, if the state may impose a tax on the contract of appellants, it may determine the rate of taxation. By making this rate prohibitive the state may forbid that means or method of building the Grand Coulee Dam. That a tax so levied is a direct burden on the choice of means by the United States or, what is the same thing, an attempt by taxation to control an operation of the United States is stated in many and is implicit in all the cases.

> McCulloch v. Maryland, 4 Wheat. 316, 436: "The states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government."

The same reasoning was employed and the same result announced in Osborn v. United States Bank, 9 Wheat. 737. In the course of its opinion, the court remarked (p. 866):

> "Can a contractor for supplying a military post with provisions, be restrained from making purchases within any state, or from transporting the provisions to the place at which the troops were stationed? or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative."

The reason underlying the rule that neither the bank nor the contractor can be taxed by the state, in the one case for making purchases or transporting provisions, in the other for conducting its trade, lies not in the character of the bank nor of the contractor but in the fact that a tax is a direct burden on the

choice by the United States of the means or method, in the one case of supplying its military posts and in the other of conducting its fiscal operations. In the case of a military post the United States might choose to purchase eggs, or milk, or cattle directly from a farmer, or it might choose to make a contract with a contractor to supply the provisions to the post. Having the right to choose the means of supplying the post, its choice cannot be controlled by a state under the guise of a tax.

Weston v. Charleston, 2 Pet. 448, 468:

> "The American people have conferred the power of borrowing money on their government, and by making that government supreme, have shielded its action, in the exercise of this power, from the action of the local governments. The grant of the power is incompatible with a restraining or controlling power, and the declaration of supremacy is a declaration that no such restraining or controlling power shall be exercised."

Again, there underlies this decision the thought that to tax one means of exercising a constitutional power of the United States is to control or burden that power directly.

The cases of Western Union Telegraph Company v. Texas, 105 U. S. 460, and Williams v. Talladega, 226 U. S. 404, were both cases of a state excise tax on the transmission of telegrams sent by officers of the United States on public business. Although the excise in form was levied on the telegraph company, it was held to be a burden on the means employed by the government to execute its constitutional powers, and therefore void.

In the first case, Telegraph Company v. Texas, the court says, page 466:

> "As to the government messages, it is a tax by the State on the means employed by the government of the United States to execute its constitutional powers, and, therefore, void. It was so decided in McCulloch v. Maryland (4 Wheat. 316) and has never been doubted since."

This language of the court is quoted with approval in the subsequent case of Williams v. Talladega, supra.

Again, we beg the court to notice that the basis of the ruling is that the means of communication by officers of the United States is within the choice of the United States; that a tax on one means of communication might be used to prevent that method of communication and therefore is a direct burden on the exercise of the constitutional powers of the United States. It was open to the officers to communicate the government's business by means other than the telegraph, for instance, by letter or by messenger. But so long as the right to choose the means to be employed rests in the United States, no state may influence that choice by making one means more expensive because of the levy of a tax thereon.

Farmers Bank v. Minnesota, 232 U. S. 516, 526:

> "But we deem it entirely clear that a tax upon the exercise of the function of issuing municipal bonds is a tax upon the operations of the government, and not in any sense a tax upon the property of the municipality. And to tax the bonds as property in the hands of the holders is, in the

> last analysis, to impose a tax upon the right of the municipality to issue them."

It is of course obvious that it is implicit in this case that a tax upon the right of the municipality to issue bonds amounts to a control by the state of the choice of means to raise money.

Panhandle Oil Company v. Knox, 277 U. S. 218, shows that the basis of this court's holdings that a sale to the United States may not be taxed by a state, lies in the right of the United States to choose its own means and sources of supply. In other words, it lies in the right of the United States to choose for itself its means of performing its governmental powers.

The same idea is implicit in Indian Motocycle Co. v. U. S. 283, U. S. 570, and Graves v. Texas Co., 298 U. S. 393. In the one case the tax on a sale of a motorcycle to a state's police department was held to be invalid; in the other, a tax on the storage of gasoline sold to the United States was held invalid. Implicit in these decisions is the thought that the tax, by adding in the one case to the cost of the motorcycle and in the other to the cost of the gasoline, controlled the choice by the municipality and the United States of the means employed in carrying on their respective governmental functions.

In the course of more than a hundred years, many judges have stated the rule forbidding a state by taxation to interfere with operations of the United States. Naturally, the language employed has varied with the habit of expression of the individual judge and with the circumstances. We submit, however, that the idea

underlying the different words employed is always the same. It may be expressed thus: to the United States have been confided certain sovereign powers; how, by what mode, by what method, in what manner, by what person, employee, agent, or instrument these sovereign powers shall be exercised must of necessity likewise be confided to the United States; the states may not interfere with the power directly; they do interfere with the power directly when they impose a tax which does, or may, influence the decision of the United States as to how, in what mode, by what method, agency or instrumentality, etc. its sovereign powers shall be exercised. This, however expressed, is always the underlying idea. The immunity from taxation is that of the United States, never that of the agent or instrument. Nor does the question, whether in a given case the execution of one of its sovereign powers is or may be interfered with, ever depend on the character or constitution of the agent. The question always is, not the effect on the agent, but the effect on the United States.

Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat. 316, 429, remarks "that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts control. * * *"

In Osborn v. United States Bank, 9 Wheat. 737, the attorneys for the State of Ohio claimed that the United States Bank was an independent contractor. Re-

plying to this contention, Chief Justice Marshall said that if the bank was in fact a contractor, still the state might not control its operation.

This court in California v. Pacific Railroad, 127 U. S. 1, describes the contract between the Railroad and the United States as a franchise and holds that it may not be taxed by the State of California.

Leloup v. Port of Mobile, 127 U. S. 640. The court refers to the telegraph company as engaged in the occupation ~~or~~ business of sending telegrams for officers of the United States. The tax on such telegrams is held invalid.

In Williams v. Talladega, 226 U. S. 404, a similar tax imposed on the telegraph company was held invalid, the court describing the telegraph company as an agency of the federal government.

Choctaw & Gulf R. R. v. Harrison, 235 U. S. 292. The railroad under contract with the United States government was engaged in mining coal upon certain Indian lands. A statute of the State of Oklahoma subjected persons engaged in mining coal to a tax measured by the gross receipts from the coal mined. This court held the tax to be beyond the power of the state. It refers to the railroad company as an instrumentality of the United States and as an agency of the United States.

Indian Oil Co. v. Oklahoma, 240 U. S. 522. This was a case of oil leases and subleases of Indian lands. The State of Oklahoma sought to reach the leases by taxing the stock of the corporation which owned the

leases. The court held the tax invalid, saying (p. 530):

> "* * * A tax upon the leases is a tax upon the power to make them. If they cannot be taxed as entities they cannot be taxed vicariously by taxing the stock, whose only value is their value, or by taking the stock as an evidence or measure of their value, * * *."

Gillespie v. Oklahoma, 257 U. S. 501. This was an attempt to tax the net income of a lessee from leases similar to those involved in the two preceding cases. The tax was held invalid. In one part of the opinion the oil company is referred to as an instrumentality of the United States, then later it is said (p. 506):

> "* * * The same considerations that invalidate a tax upon the leases invalidate a tax upon the profits of the leases, and, stopping short of theoretical possibilities, a tax upon such profits is a direct hamper upon the effort of the United States to make the best terms that it can for its wards."

Similar holdings with analogous language and analogous principles are Jaybird Mining Co. v. Weir, 271 U. S. 609, and Burnet v. Coronado Oil & Gas Co., 285 U. S. 393.

The oil company in Panhandle Oil Co. v. Knox, supra, the motorcycle company in Indian Motocycle v. United States, supra, Texas company in Graves v. Texas Company, supra, the United States bank in McCulloch v. Maryland, supra, and in Osborn v. United States Bank, supra, the telegraph company in Western Union Telegraph Co. v. Texas, supra, and Williams v. Talladega, supra, the railroad company in California v. Pacific Railroad Company, supra, the

telegraph company in Leloup v. Port of Mobile, supra, the railroad company in Chotaw & Gulf R. R. v. Harrison, supra, the oil company in Indian Oil Company v. Oklahoma, supra, and in Gillespie v. Oklahoma, supra, and the mining company in Jaybird Mining Co. v. Weir, supra, and the oil company in Burnet v. Coronado Oil & Gas Company, supra, were none of them subdivisions or officers of the federal or state government in such a sense as to entitle them to exemption from state or federal taxation by reason of their character. The banks, the railroads, the telegraph companies, the mining companies and the oil companies were each and all engaging in private business for gain. In each and every case their only connection with the federal government was a contract with it to perform certain things for it. We submit that whether a person or corporation, making a sale to the United States or performing services for it, be referred to as an instrumentality or an agency, or whether the challenged tax be referred to as resting upon the instrumentality or agency, or upon the contract or franchise, still the ground of every case is interference with the operation of a governmental function of the United States or of a state. We submit further, that whenever the tax directly adds to the purchase price or consideration the United States must pay, then it is a direct burden upon the means chosen by the United States to perform a governmental function. Whenever this is the effect of the tax, it is void.

In all the cases, the court is seeking to prevent interference by one sovereignty with the exercise of some

power confided to the other. A tax, when levied upon one of several possible means of exercising the power, operates necessarily to influence the decision whether that means shall be employed. The influence is direct, the burden is apparent, because the means to be employed can be compelled by taxing every means except the one. Thus, in the present case the State of Washington can compel the United States to build the Grand Coulee Dam through government employed labor, if it may tax, at prohibitive rates, every other means of building a dam. Such a tax then, laid on one of several means of exercising a power, is properly said to be laid on the choice of means.

The case of Trinityfarm Construction Co. v. Grosjean, 291 U. S. 466, is an apt illustration of the proposition. In the exercise of the power to regulate commerce the United States was engaged in building levees in aid of navigation of the Mississippi. So far, the case is parallel to building a dam in the Columbia River in aid of navigation. The United States exercised its power to choose the means of doing the work by letting a contract to the construction company. Again as in the present case. The State of Louisiana levied a tax of five cents per gallon upon gasoline purchased by the contractor for use in his power driven machinery. Mark, if you please, the difference here. The tax is not levied on one of the several means within the choice of the United States and therefore it did not affect its choice of means. This the court recognizes in the following language (p. 472):

> "It is not laid upon the choice of means, the making of the contracts, the contracts themselves,

> or any transaction to which the federal government is a party or in which it is immediately and directly concerned."

Precisely so. The challenged tax was not laid upon the *government's* choice of means, but upon the *contractor's* choice of means in the details of *his* performance. How or by what means the contractor should perform his work was pursuant to his policy and his ends, not the government's. This is made yet more plain in the next sentence:

> "Nor is the exaction laid or dependent upon the amounts, gross or net, received by the contractor."

Suppose, however, the challenged tax in the Grosjean case were one "laid upon the choice of means," "or the contracts themselves," would not the tax have been held invalid? Suppose, instead of on the contractor's property, the tax in the Grosjean case laid (as in the case at bar) as an excise upon the privilege of performing the contract with the government, would not such a tax be laid "upon the choice of means" of the government, or (differently expressed) "the making of the contracts, the contract themselves," or a transaction "to which the federal government is a party *and* in which it is immediately and directly concerned"?

Suppose, again, "the exaction laid and dependent upon the amounts received by the contractor" (and for the sake of emphasis upon the *gross* amount) would not that have labeled the tax as one laid upon the choice of means, the making of the contract, the contracts themselves, and a transaction to which the gov-

ernment was a party, and in which it was immediately and directly concerned.

In the case at bar, the tax is an excise tax upon the privilege of performing a contract with the United States and measured as to its amount by the gross sum paid to the contractor by the United States government. As such, we submit it to be a tax levied upon the choice of means of the United States, or upon the making of the contract, or upon the contract itself, or upon a transaction in which the United States is immediately and directly concerned. As such, it is beyond the power of the state.

F. THE GRAND COULEE DAM AN EXERCISE OF CONSTITUTIONAL POWER.

That the improvement of the navigation of a navigable river is a proper exercise of the commerce power of the United States and that a proper means of improving navigation is the control of water by dams and that the declaration by Congress of its purpose to improve navigation by such means is not open to question, are propositions established by the decisions. Green Bay Canal Co. v. Patten Paper Company, 172 U. S. 58; Arizona v. California, 283 U. S. 423; Trinityfarm Co. v. Grosjean, 291 U. S. 466; Ashwander v. Tennessee Valley Authority, 297 U. S. 288. Since the statute authorizing the erection of the Grand Coulee Dam states that its purpose is the improvement of navigation, it is a necessary consequence that the enterprise is undertaken in furtherance of a consti-

tutional power of the government of the United States.

G. STATE WITHOUT JURISDICTION TO TAX TRANSACTION.

All work under the contract between appellants and the United States is done upon land acquired by the United States by purchase with the consent of the State of Washington. The parties at the trial stipulated to the fact of purchase. The consent of the State of Washington has been given by statute. Rem. Rev. Stat. § 8108. Appellants in this case contend that since exclusive jurisdiction over the premises upon which their contract must be performed has been ceded to the United States, it follows that no jurisdiction to tax the occupation of performing the contract can be asserted by the State of Washington.

The present case was tried at the same time as the cases of David H. Ryan, Appellant v. The State of Washington, Appellee, and David H. Ryan, Appellant, v. Tax Commission of the State of Washington; Harold H. Henneford, Thomas S. Hedges, and T. M. Jenner, constituting the Tax Commission of the State of Washington, Appellees. (Referred to herein as the Ryan cases.) To save the burden on court and parties of introducing the same evidence and repeating the same stipulations in each of the cases, it was stipulated that the evidence introduced and stipulations made in the several cases should be considered as introduced and made in each of the others. The record on appeal to the Supreme Court of the State of Wash-

ington was so prepared and certified. On that appeal, the cases were again set together. By agreement, the question of cession of jurisdiction to tax was presented in the briefs in the Ryan cases while the other questions were presented in the present case. This arrangement was carried out at the oral argument by consent of the court. The decisions of the court follow the same plan. The appellants in both cases have preserved the questions at all stages of the cases.

Counsel for appellants in this case have asked leave to file a brief amici curiae in the Ryan cases and to be permitted to participate in the oral argument. It will manifestly be of convenience to the court as well as to counsel to follow the arrangement adopted in the state courts. Appellants therefore submit this point on the briefs and argument in the Ryan cases.

CONCLUSION

It is submitted that the judgment of the Supreme Court of the State of Washington dated October 28, 1936, should be reversed and judgment rendered in favor of the appellants.

Respectfully submitted,

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